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May 13, 2016

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Jeff S. Jordan  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: MUR 7029  
Katie McGinty and Katie McGinty for Senate

Dear Mr. Jordan:

We write as counsel to Katie McGinty, Katie McGinty for Senate ("the Committee"), and Roberta Golden in her official capacity as Treasurer<sup>1</sup> ("Respondents"), in response to the complaint filed by the Republican Party of Pennsylvania on March 28, 2016 ("the Complaint"). The Complaint alleges that Respondents engaged in prohibited coordination with EMILY's List, WOMEN VOTE!, and the League of Conservation Voters Action Fund.<sup>2</sup> But the Complaint provides no credible support for this claim and fails to present any specific facts that would amount to a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Thus, the Commission should find no reason to believe that Respondents violated the Act, and it should dismiss the Complaint.

## I. FACTUAL BACKGROUND

Katie McGinty is the Democratic nominee for U.S. Senate in Pennsylvania. At the time the Complaint was filed, Ms. McGinty was a candidate for the Democratic nomination in that race. EMILY's List is a political action committee registered with the Federal Election Commission ("the Commission"). EMILY's List has endorsed Ms. McGinty and provided direct financial support to her campaign.

<sup>1</sup> The Complaint names Jordyn Rush as treasurer of the Committee. However, Roberta Golden replaced Jordyn Rush as treasurer on October 15, 2015.

<sup>2</sup> This Response addresses the Complaint's allegations of impermissible coordination between Respondents and WOMEN VOTE!. Neither the League of Conservation Voters Action Fund nor EMILY's List sponsored any independent expenditures in support of Ms. McGinty's candidacy. Because the law prohibits coordination only as it relates to communications that constitute independent expenditures, the Complaint's allegations against entities that have not sponsored any independent expenditures must fail.

On March 9, 2016, WOMEN VOTE!, the independent expenditure arm of EMILY's List, issued a press release announcing its plan to spend a significant amount of funds on independent expenditures in support of Ms. McGinty in the primary election.<sup>3</sup> At that time, information about WOMEN VOTE!'s planned spending in support of Ms. McGinty became public knowledge and began being widely reported by news outlets.<sup>4</sup>

The Complaint alleges that Respondents and WOMEN VOTE! engaged in prohibited coordination. Further, the Complaint appears to conclude that *every* forthcoming independent expenditure advertisement sponsored by WOMEN VOTE! in support of Ms. McGinty's candidacy must have been coordinated. The sole basis for this allegation is a March 10, 2016, *Politico* "Morning Score" report containing the following comments by former Governor Ed Rendell, chairman of the Committee:

Former Gov. Ed Rendell, McGinty's campaign chairman, told Campaign Pro that EMILY's List will spend far more than \$ 1 million on the race. Rendell, who has said McGinty and outside groups need to spend at least \$3.5 million combined in the primary, said he believed EMILY's List would spend at least \$ 2 million on television, with some of the cash coming from the League of Conservation Voters. Both groups have endorsed McGinty, and Rendell said EMILY's List would be placed in charge of the pro-McGinty independent expenditure operation.<sup>5</sup>

From this statement alone, the Complaint alleges that Governor Rendell provided reporters with the "non-public spending plans of two outside groups" and incorrectly concludes that there was "no possible way he could have that information" unless prohibited coordination had occurred between Respondents and the outside groups.<sup>6</sup> However, Governor Rendell's statements, which

<sup>3</sup> WOMEN VOTE! Press Release, "WOMEN VOTE! Launches \$1 million Program in Pennsylvania," March 9, 2016, available at <http://emilyslist.org/news/entry/women-vote-launches-1-million-program-in-pennsylvania>.

<sup>4</sup> See, e.g., J. Mathis, EMILY's List Vows \$1M to Back McGinty, Philadelphia, Mar. 10, 2016, available at <http://www.phillymag.com/tag/joe-sestak/>; *Politico*, Morning Score, "EMILY's List Commits to Spending \$1M in Pennsylvania," Mar. 10, 2016, available at <http://www.politico.com/tipsheets/morning-score/2016/03/boehner-invisible-as-candidates-scrap-to-replace-him-in-ohio-clinton-sanders-debate-in-miami-outside-money-pours-into-pennsylvania-senate-213144>.

<sup>5</sup> *Politico*, Morning Score, "EMILY's List Commits to Spending \$1M in Pennsylvania," Mar. 10, 2016, available at <http://www.politico.com/tipsheets/morning-score/2016/03/boehner-invisible-as-candidates-scrap-to-replace-him-in-ohio-clinton-sanders-debate-in-miami-outside-money-pours-into-pennsylvania-senate-213144>.

<sup>6</sup> Compl. at 2.

were largely based on conjecture and information that was publicly available at the time, do not demonstrate that impermissible coordination occurred between Respondents and WOMEN VOTE!. Further, as described below, Respondents did not engage in impermissible coordination with WOMEN VOTE!, and the Complaint does not provide anything more than "mere speculation" to support its allegation that coordination occurred.

## II. LEGAL ANALYSIS

### A. The Complaint fails to allege facts, which, if proven true would result in a violation of the Act.

The Commission will not find a reason to believe that a violation of the Act has occurred based on "mere speculation."<sup>7</sup> Rather, it looks to whether the Complaint presents "facts which describe a violation of a statute or regulation over which the Commission has jurisdiction."<sup>8</sup> Here, the alleged violation is that Respondents engaged in conduct that resulted in coordinated communications with non-party, non-candidate groups. To determine whether a communication is coordinated, Commission regulations provide the following three-pronged test: (1) the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied.

A communication paid for by a non-party, non-candidate sponsor satisfies the conduct standard if: (1) the communication is created, produced, or distributed at the request or suggestion of a candidate, candidate's committee, or agent of the foregoing, or is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, candidate's committee, or agent of the foregoing assents to the suggestion; (2) a candidate, candidate's committee, or agent of the foregoing is materially involved in decisions regarding six specifically delineated aspects of the communication; (3) the communication is created, produced, or distributed after one or more substantial discussions about the communication between the payor and the candidate, candidate's committee, or agent of the foregoing, if information about the candidate's campaign plans, projects, activities, or needs is conveyed to the payor and that information is material to the communication's creation, production, or distribution; (4) the payor or its agent contracts with or employs a common vendor of certain delineated services, and the common vendor uses or conveys certain material information in the creation, production, or distribution of the communication; (5) the payor is a former employee or

<sup>7</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001).

<sup>8</sup> See 11 C.F.R. § 111.4(d)(3).

independent contractor of the candidate, candidate's committee, or agent of the foregoing and that person conveys certain material information in the creation, production or distribution of the communication; or (6) the communication disseminates, distributes, or republishes campaign material.<sup>9</sup> If one of these six conduct standards is not triggered by the circumstances of a particular communication, then the requirements for coordination have not been satisfied, and the communication in question will not be deemed to be coordinated.<sup>10</sup>

Respondents do not dispute that non-party, non-candidate sponsors paid for public communications in support of the Committee, and therefore that at least one of the prongs of 11 C.F.R. § 109.21(a) may have been satisfied. However, here, whether a violation occurred hinges on whether the Committee or its agents engaged in prohibited conduct under 11 C.F.R. § 109.21(d). The Complaint baldly alleges that one of the six conduct standards were met, but it provides no facts at all to support this general allegation. Instead, the Complaint merely speculates that one of these standards must have been met and asks the Commission to accept this speculation as fact. However, the Complaint's unsupported allegation of coordination is precisely the sort of "mere speculation" that warrants immediate dismissal.<sup>11</sup>

**B. Respondents' actions did not satisfy the conduct standards for coordinated communications.**

In addition, the Complaint's unsubstantiated allegations of coordination are patently false. Respondents have not engaged in prohibited coordination with WOMEN VOTE!. Relying on public statements made by the Chairman of the Committee to *Politico*, the Complaint appears to allege that *every* independent expenditure made by WOMEN VOTE! in support of Ms. McGinty was illegally coordinated. However, the Complaint fails to take into account the reality that Governor Rendell's statements to *Politico* were based on publicly available information and conjecture.<sup>12</sup> The statements were not, as the Complaint alleges, based on impermissible communications with WOMEN VOTE!.

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<sup>9</sup> See 11 C.F.R. § 109.21(d).

<sup>10</sup> See *id.* § 109.21(a).

<sup>11</sup> *Id.* § 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001).

<sup>12</sup> See, e.g., J. Mathis, EMILY's List Vows \$1M to Back McGinty, Philadelphia, Mar. 10, 2016, *available at* <http://www.phillymag.com/tag/joe-sestak/>; WOMEN VOTE! Press Release, "WOMEN VOTE! Launches \$1 million Program in Pennsylvania," March 9, 2016, *available at* <http://emilyslist.org/news/entry/women-vote-launches-1-million-program-in-pennsylvania>.

Indeed, Respondents have not engaged in any activity that would satisfy the conduct prong of 11 C.F.R. § 109.21(d). Respondents did not have any material advance knowledge of or involvement with WOMEN VOTE!'s independent expenditure program. Respondents did not request, suggest, or otherwise assent to the production or broadcast of any of WOMEN VOTE!'s advertisements, and the Complaint does not allege any specific facts to suggest that they did. Respondents have not engaged in any substantial discussion with WOMEN VOTE! or its agents, nor has any former employee or contractor of Respondents conveyed any material information to WOMEN VOTE! or its agents, and the Complaint does not allege any specific facts suggest that they did. Finally, Respondents and WOMEN VOTE! have not contracted with or employed any common vendors as that term is defined in 11 C.F.R. § 109.21(d)(4), and the Complaint does not allege any specific facts to the contrary.

To the extent that the Complaint alleges that Governor Rendell's statements were themselves an impermissible "request or suggestion," that allegation presents no violation of the Act. The "request or suggestion" conduct standard is intended to cover only "requests or suggestions made to a select audience, but not those offered to the public generally."<sup>13</sup> Further, "a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1)." Here, Governor Rendell's statements were not a "request or suggestion," but even if they had been, they were reported on a publicly available website, and thus cannot constitute prohibited conduct under the coordination regulations.

Finally, it is Respondents' understanding that EMILY's List and WOMEN VOTE! have implemented a firewall policy under which WOMEN VOTE! employees and consultants are barred from interacting with federal candidates, political party committees, or agents of the foregoing. In addition, WOMEN VOTE! employees and consultants are barred from interacting with EMILY's List staff, consultants, and other agents who work on the "coordinated side" of the firewall. Accordingly, while the Committee and its agents, including Governor Rendell, may have interacted with EMILY's List employees and consultants who are on the "coordinated side" of the firewall, neither Governor Rendell nor any other agent of the Committee has interacted with any employee, consultant, vendor, or other agent of WOMEN VOTE!. Thus, the conduct standards required for coordination have not been triggered.

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<sup>13</sup> MUR 6411, First General Counsel's Report at 12-13 (May 16, 2011); *see also* Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

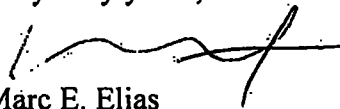
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### III. CONCLUSION

The Complaint fails to present the essential elements of a coordination claim because it does not present any specific facts supporting its assertion that there was coordination between Respondents and WOMEN VOTE!. Rather, it assumes that every independent expenditure sponsored by WOMEN VOTE! must have been coordinated, without offering any specific facts to support that assumption. This is just the sort of "mere speculation" that the Commission does not accept as true.<sup>14</sup>

Accordingly, and because no coordination occurred, Respondents respectfully request that the Commission find no reason to believe that they violated the Act, and dismiss the matter immediately.

Very truly yours,



Marc E. Elias  
Danielle E. Friedman  
Counsel to Katie McGinty and Katie McGinty for Senate

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<sup>14</sup> 11 C.F.R. § 111.4(a), (d); MUR 4960, Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas (Dec. 21, 2001).